



DEPARTMENT OF VETERANS AFFAIRS  
Washington DC 20420

May 30, 2019

In Reply Refer To: 001B  
FOIA Request: 19-07249-F

Austin Evers & Dan McGrath  
American Oversight  
1030 15<sup>th</sup> Street NW, Suite B255  
Washington, DC 20005  
[FOIA@americanoversight.org](mailto:FOIA@americanoversight.org); [daniel.mcgrath@americanoversight.org](mailto:daniel.mcgrath@americanoversight.org)

Dear Mr. Evers and McGrath:

This is the Initial Agency Decision (IAD) to your Freedom of Information Act (FOIA) request to the Office of the Secretary, U.S. Department of Veterans Affairs (OSVA), dated and received May 1, 2019, and assigned FOIA tracking number **19-07249-F**. You requested:

"All WhatsApp messages sent or received between (1) the VA officials specified below and (2) White House adviser Jared Kushner. Screenshots of WhatsApp messages with Kushner are considered responsive to this request.

- i. Former Secretary David Shulkin
- ii. Former Chief Information Officer Scott Blackburn
- iii. Former Chief of Staff Peter O'Rourke."

As a reminder, on May 21, 2019, for your FOIA request **19-07250-F**, the VA OIT FOIA office issued you a "no records" response and explained, "OIT&T consulted with Information Technology Operations and Services (ITOPS) who indicated they do not pull records from WhatsApp, because it is an external application and VA does not monitor."

**IAD & Reasonable Searches Dated 5/29/19 & 5/30/19**

On May 29, 2019, and May 30, 2019, in addition to consulting with ITOPS, the OSVA FOIA Officer conducted research as to whether OSVA would retain WhatsApp messages within VA Systems of Records. The OSVA FOIA Officer also researched VA Deputy Secretary's January 2, 2018, Memorandum titled, "Proper Use of Email and Other Messaging Services."

Paragraph 7 of that January 2, 2018, Memorandum says, "Short Message Service (SMS) messages, also known as text messages, . . . are not retained on any VA system. Rather, the information resides with the service provider, such as Verizon or AT&T, on their networks and on the mobile device in the user's possession."

Additionally, when OSVA employees leave the VA, as standard protocol, the OSVA Equipment Manager or the VA OIT office returns the contracted mobile phones back to the VA contractor. As OSVA does not retain WhatsApp messages or the mobile phones of former OSVA employees, OSVA issues you a "no records" response.

FOIA obligates federal agencies to process records within their Systems of Records, not create records or Systems of Records that federal agencies do not already have. LaRoche v. SEC, 289 F. App'x 231, 231 (9th Cir. 2008) (explaining that agency was not required to create new documents to satisfy FOIA request); Poll v. U.S. Office of Special Counsel, No. 99-4021, 2000 WL 14422, at \*5 n.2 (10th Cir. Jan. 10, 2000) (recognizing that FOIA does not require agency "to create documents or opinions in response to an individual's request for information"

(quoting Hudgins v. IRS, 620 F. Supp. 19, 21 (D.D.C. 1985)); Sorrells v. United States, No. 97-5586, 1998 WL 58080, at \*1 (6th Cir. Feb. 6, 1998) (advising that agency is not required to compile document that "contain[s] a full, legible signature"); Krohn v. DOJ, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" information sought); *Citizen's Guide on Using FOIA*, U.S. House Oversight & Gov't Reform Comm. §V.B, pp. 6 (Sept. 2012), <https://oversight.house.gov/wp-content/uploads/2012/09/Citizens-Guide-on-Using-FOIA.2012.pdf> ("Please be advised an agency is not obligated to create a new record to comply with a request").

### **FOIA Mediation**

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. Under the provisions of the FOIA Improvement Act of 2016, the following contact information is provided to assist FOIA requesters in resolving disputes:

### **VA Central Office FOIA Public Liaison:**

Name: John Buck

Email Address: [vacofoiaservice@va.gov](mailto:vacofoiaservice@va.gov)

### **Office of Government Information Services (OGIS)**

Email Address: [ogis@nara.gov](mailto:ogis@nara.gov)

Fax: 202-741-5769

Mailing address:

National Archives and Records Administration

8601 Adelphi Road

College Park, MD 20740-6001

### **FOIA Appeal**

This concludes OSVA's Initial Agency Decision to request **19-07249-F**. Please be advised that should you desire to do so, you may appeal the determination made in this response to:

Office of General Counsel (024)

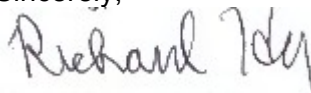
Department of Veterans Affairs

810 Vermont Avenue, NW

Washington, DC 20420

If you should choose to file an appeal, please include a copy of this letter with your written appeal and clearly indicate the basis for your disagreement with the determination set forth in this response. Please be advised that in accordance with VA's implementing FOIA regulations at 38 C.F.R. § 1.559, your appeal must be postmarked no later than ninety (90) days of the date of this letter.

Sincerely,



Richard Ha, JD, CIPP/G  
OSVA FOIA Officer

Attachment - January 2, 2018, Memo: "Proper Use of Email and Other Messaging Services"

# Memorandum

**Date:** JAN - 2 2018

**From:** Deputy Secretary (001)

**Subj:** Proper Use of Email and Other Messaging Services

**To:** Under Secretaries, Assistant Secretaries, and Other Key Officials

1. This memorandum and its attachment supersede the attached memorandum dated April 24, 2015, and are intended to advise all VA personnel, including employees, contractors, trainees, and volunteers, that the use of non-official accounts or devices to conduct official agency business is prohibited.

2. VA records, including those generated by electronic communications, must remain within a secure VA information system, be managed in accordance with the applicable records management requirements, and employ, if appropriate, VA-approved encryption. Records are defined by the Federal Records Act as "all recorded information . . . made or received by a Federal agency . . . in connection with the transaction of public business and appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the . . . Government or because of the informational value of the data in them." 44 United States Code § 3301(a)(1)(A).

3. To ensure proper preservation of records generated by email, VA users conducting agency business must use, whenever feasible, official email accounts, such as an email address with @va.gov as the domain name. VA users may not conduct agency business through the use of non-official email accounts, such as Gmail or Yahoo. If, however, circumstances make use of a non-official email account unavoidable, the user must:

a. Copy the user's official email address so that the message is sent simultaneously to the official account at the moment of transmission; or

b. Forward a complete copy of the message to the user's official email address within 20 days of the original transmission.

4. Contractors conducting VA business who are assigned VA email accounts will use those accounts to transmit emails that meet the definition of a Federal Record ("record emails"). If a contractor is unable to use the VA email account due to technical constraints, the corporate email account may be used if at least one of the following requirements is met:

a. The record emails contain no Controlled Unclassified Information or other VA sensitive information, or are protected by encryption compliant with the standards established by the National Institute of Standards and

## Proper Use of Email and Other Messaging Services

Technology (NIST) in Federal Information Processing Standards Publication 140-2, Security Requirements for Cryptographic Modules; or

- b. The contractor has implemented basic safeguards as outlined in 48 Code of Federal Regulations (C.F.R.) § 52.204-21 and the recommended security requirements in NIST Special Publication (SP) 800-171, Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations.
5. If any record emails are transmitted using a corporate email account, the contractor must also comply with all applicable records management laws, including National Archives and Records Administration (NARA) regulations and VA policies and procedures. As such, the contractor must copy any record email to a VA email system or VA record-keeping system within 20 days by simultaneously sending a copy to a VA email account or forwarding the message to a VA email account within that time frame. To ensure contractor compliance, VA shall insert the clause at 48 C.F.R. § 52.204-21, Basic Safeguarding of Covered Contractor Information Systems, and appropriate records management language in solicitations and contracts.
6. Instant messages (IM) sent or received by VA personnel using Microsoft Lync or Skype for Business are generally retained in a VA system. For many VA users, IMs are not retained beyond the conclusion of the conversation. Since information transmitted by IM may not be properly preserved, VA personnel should not use IMs to conduct communications that are likely to generate VA records. To the extent that record material is created using IM, the content must be copied to a recordkeeping system to ensure proper preservation.
7. Short Message Service (SMS) messages, also known as text messages, sent or received by VA personnel using a iPhone, Blackberry, or other mobile device, whether VA-issued or personally owned, are not retained on any VA system. Rather, the information resides with the service provider, such as Verizon or AT&T, on their networks and on the mobile device in the user's possession. Since the information transmitted by SMS is arguably outside VA custody, VA personnel should not use SMS to conduct communications that are likely to generate record material. To the extent that VA records are created using SMS, the content must be copied to a recordkeeping system to ensure proper preservation.

Page 3.

Proper Use of Email and Other Messaging Services

8. Attached is guidance to be distributed to the appropriate personnel in your Administration or Staff Office so that you may make them aware of these requirements. Gi-Hyun An is available at (202) 461-7684 to address any questions concerning this memorandum.

A handwritten signature in black ink, reading "Thomas G. Bowman". The signature is fluid and cursive, with a large initial "T" and a long, sweeping underline.

Thomas G. Bowman

Attachment



**Department of  
Veterans Affairs**  
APR 24 2015

# Memorandum

Date:   
From: Executive in Charge and Chief Information Officer, Office of Information and Technology (005)   
Subj: Use of Personal Email (VAIQ #7581492)   
To: Under Secretaries, Assistant Secretaries, and Other Key Officials

1. This memo reminds all VA staff and contractors that the use of a personal email account or the use of a personal email system to conduct official agency business is not allowed. Please distribute this memo, as appropriate, through your channels. Official agency email records are to remain within a secure VA email system and use appropriate VA-approved encryption, when applicable. If there are questions about what constitutes a record, please work with your designated records management officials.

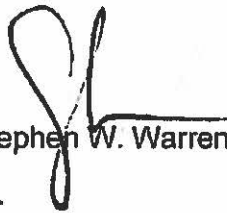
2. VA employees, contractors, volunteers, trainees or anyone with a valid VA email address are required to take the annual mandatory Privacy and Security Awareness training and subsequently sign the appropriate VA National Rules of Behavior or the VA Contractor Rules of Behavior. This mandatory training provides guidance indicating that employees/contractors should never conduct VA business through personal emails, personal IMs, or personal phone text messages and to not use personal email addresses to communicate about VA business.

3. In situations where personal email was utilized, *The Presidential and Federal Records Act Amendments of 2014, Public Law 113-187*, directs that any officer or employee of an executive level agency may not create or send an email message using a non-government official electronic email system unless either of the following conditions are met: (a) the email is immediately sent to another official government email account or; (b) the complete copy of the email is forwarded to a government email account within 20 days of the original creation or transmission of the email record. The intentional violation of this act shall be a basis for disciplinary action.

Page 2.

Use of Personal Email (VAIQ #7581492)

4. If you have any questions, feel free to call me at (202) 461-6910 or have a member of your staff contact John Oswalt, Senior Agency Official for Records, at (202) 632-7489.



Stephen W. Warren

cc:

Deputy Assistant Secretary Information Security (005R)  
Deputy Assistant Secretary, Information Technology Resource Management (005F)  
Deputy Chief Information Officer, Architecture, Strategy, and Design (005E)  
Acting Executive Director, Office of Enterprise Communications (005EC)  
Deputy Chief Information Officer, Product Development (005Q)  
Deputy Chief Information Officer, Service, Delivery and Engineering (005OP)  
Executive Director for Quality, Performance and Oversight (005X)  
Executive Director for VLER Enterprise PMO (005C)  
Deputy Director for Interagency Program Office (005J)  
Advocate for Health (005A)  
Advocate for Benefits (005A)  
Advocate for Corporate Customers (005A)